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Supreme Court, U.S.
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No. 00–596

IN THE

Supreme Court of the United States

LORILLARD TOBACCO COMPANY, *et al.*,
Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR PETITIONERS LORILLARD TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, R.J. REYNOLDS TOBACCO COMPANY, AND PHILIP MORRIS INCORPORATED

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QUESTIONS PRESENTED

1. Whether state regulations that sharply limit the public display of cigarette advertisements impose requirements "with respect to the advertising or promotion" of cigarettes within the meaning of the preemption provision of the Federal Cigarette Labeling and Advertising Act.

2. Whether Massachusetts' content- and viewpoint-based prohibition on virtually any public display of tobacco advertisements violates the First Amendment, either under the strict scrutiny standard that Petitioners contend is applicable or under the test set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

PARTIES TO THE PROCEEDINGS

The Petitioners in No. 00-596 are Lorillard Tobacco Company; Brown & Williamson Tobacco Corporation; R.J. Reynolds Tobacco Company; Philip Morris Incorporated; and U.S. Smokeless Tobacco Company (formerly United States Tobacco Company). The Respondent is Thomas Reilly, the Attorney General of Massachusetts. The Petitioners in No. 00-597, which has been consolidated with No. 00-596, are Altadis U.S.A. Inc., as successor to Consolidated Cigar Corp. and Havatampa, Inc.; General Cigar Co., Inc.; John Middleton, Inc.; Lane Limited, as successor to Tobacco Exporters International (USA) Ltd.; L.J. Peretti Co., Inc.; Swedish Match North American, Inc.; Swisher International, Inc., who were also parties to the consolidated appeals below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

SUMMARY OF ARGUMENT 10

ARGUMENT 13

I. Massachusetts' Severe Limitations on the Display of Cigarette Advertising Impose Requirements "With Respect to . . . Advertising" Within the Meaning of the Preemption Provision of the Federal Cigarette Labeling and Advertising Act . 13

II. In Broadly Banning Speech Promoting Tobacco Products, the Massachusetts Regulations Violate the First and Fourteenth Amendments 25

A. Strict Scrutiny Governs Massachusetts' Impermissibly Content-Based Restrictions on Commercial Speech 26

B. The Regulations Also Are Viewpoint-Discriminatory In Nature And Warrant Strict Scrutiny For This Independent Reason As Well 39

TABLE OF CONTENTS (cont'd)

Page

C. Massachusetts' Near-Total Ban On Outdoor and Indoor Tobacco Advertising Fails *Central Hudson* 41

CONCLUSION 50

TABLE OF AUTHORITIES

Cases **Page**

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) ..... *passim*
American Nat'l Red Cross v. S.G., 505 U.S. 247 (1992) 20
Bates v. State Bar of Ariz., 433 U.S. 350 (1977) ... 28, 38
Beach v. Ocwen Fed. Bank, 523 U.S. 410 (1998) 23
Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983) ..... *passim*
CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993) . 15
Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) ..... *passim*
Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980) ..... *passim*
Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) 33, 34, 44
Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992). ..... *passim*
City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) 39
Consolidated Edison Co. of N.Y., Inc. v. Public Serv. Comm'n of N.Y., 447 U.S. 530 (1980) 32
DeBuono v. NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. 806 (1997) 17
Denver Area Educ. Tel. Consortium, Inc. v. FCC, 518 U.S. 727 (1996) 48
District of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125 (1992). 10, 17
Edenfield v. Fane, 507 U.S. 761 (1993) 27, 41
FDA v. Brown & Williamson Tobacco Co., 529 U.S. 120 (2000) 42
FMC Corp. v. Holliday, 498 U.S. 52 (1990) 15
Florida Bar v. Went for It, Inc., 515 U.S. 618 (1995) 27, 45

TABLE OF AUTHORITIES (cont'd)

Page

Friedman v. Rogers, 440 U.S. 1 (1979) 27
Geier v. American Honda Motor Co., 529 U.S. 861, 120 S. Ct. 1913 (2000) 21
Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999) 41, 43, 45
Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85 (1977) 37, 45
Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825 (1988) 21
Meese v. Keene, 481 U.S. 465 (1987) 39
Morales v. Trans World Airlines, 504 U.S. 374 (1992) 18, 21, 23, 24
New York State Conference of Blue Cross & Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995) . . . . . *passim*
New York Times v. Sullivan, 376 U.S. 254 (1964) 34
Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) . 28
Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) 27
Posadas de Puerto Rico Assoc. v. Tourism Co., 478 U.S. 328 (1986) 33
R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) . . . . *passim*
Reno v. ACLU, 521 U.S. 844 (1997) 48
Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) 12, 39, 40
Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) . *passim*
Russello v. United States, 464 U.S. 16 (1983) 19
Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989) 48
Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993) 19
San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987) 32

TABLE OF AUTHORITIES (cont'd)

Page

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 15
Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105 (1991) 27, 30
Texas v. Johnson, 491 U.S. 397 (1989) 27
United States v. Edge Broad. Co., 509 U.S. 418 (1993) 31
United States v. Playboy Entertainment Group, 529 U.S. 803, 120 S. Ct. 1878 (2000) 38, 48
Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) 34, 46
Ward v. Rock Against Racism, 491 U.S. 781 (1989) ... 32
Zauderer v. Office of Disciplinary Counsel of S. Ct. of Ohio, 471 U.S. 626 (1985) 46

Statutes

U.S. Const. art. VI, cl. 2 1
15 U.S.C. § 1331. ..... 2, 7, 14
15 U.S.C. § 1333 14
15 U.S.C. § 1334 ..... *passim*
15 U.S.C. § 1335 14
15 U.S.C. § 1336 14
15 U.S.C. § 1337 14
28 U.S.C. § 1254(1) 1
29 U.S.C. § 1144(a) 16
49 U.S.C. App. § 1305(a) 18
Pub. L. No. 89-92, 79 Stat. 282 (1965) 20
Pub. L. No. 91-222, 84 Stat. 87 (1970) 20, 24
Ariz. Rev. Stat. Ann. § 13-3622 25
Cal. Penal Code § 308 25
Mass. Gen. Laws Ann. ch. 270, § 6A 25
Mass. Gen. Laws ch. 93A, § 2 4
Minn. Stat. § 461.12 25
940 C.M.R. § 21.01 3

TABLE OF AUTHORITIES (cont'd)

Page

940 C.M.R. § 21.03 ..... 5, 35, 41
940 C.M.R. § 21.04 ..... *passim*
940 C.M.R. § 22.06 ..... *passim*

Miscellaneous

S. Rep. No. 91-566, *reprinted in* 1970 U.S.C.C.A.N. 2652 ..... 22, 24
H. Landrine, *Asking Age and Identification May Decrease Minors' Access to Tobacco*, 25 Preventive Medicine (1996) 25
WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976) 16

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-45a) is reported at 218 F.3d 30. The district court's decision on the preemption claim (Pet. App. 46a-60a) is reported at 76 F. Supp. 2d 124, and its decision on the First Amendment claim (Pet. App. 61a-104a) is reported at 84 F. Supp. 2d 180.

JURISDICTION

The court of appeals entered its judgment in the consolidated appeals on July 17, 2000. Pet. App. 1a. The petition for a writ of certiorari was filed on October 16, 2000. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The challenged regulations are reprinted in the Appendix to the Petition (Pet. App. 105a-126a), as is the statute under which the regulations were promulgated (Pet. App. 127a).

Section 5 of the Federal Cigarette Labeling and Advertising Act, as amended, provides:

> (a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
>
> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334 (2000).

The Supremacy Clause of the United States Constitution, art. VI, cl. 2, provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme

> Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

STATEMENT

In recent years, numerous States and local jurisdictions have enacted diverse and increasingly severe limitations on the public display of tobacco advertisements. *See, e.g.*, Pet. App. 128a-34a. Like the Massachusetts regulations at issue in this case, many of these restrictions prohibit virtually *all* outdoor advertising within a broadly defined distance of any "park," "playground," or "school." As in this case, the resulting geographical sweep of these prohibitions often covers as much as 90% of the most populated areas in the jurisdiction. And again, like the regulations in this case, many of these regulations impose further substantial restrictions on the display of tobacco advertising *inside* retail establishments. The purpose of all these restrictions is unabashedly censorial: as Respondent acknowledged below, the challenged regulations are based on the premise that, for the putative purpose of preventing children from being exposed to "positive" images of tobacco products that involve significant health risks, any tobacco advertising aimed at adults must be banned from virtually all public areas.

Petitioners (various tobacco manufacturers) brought suit, contending that Massachusetts' severe restrictions on cigarette advertising were preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 *et seq.*, and violated the First and Fourteenth Amendments. The court of appeals ultimately rejected both challenges and upheld the relevant provisions of the regulations. Pet. App. 1a-37a. It is this decision that is presently before the Court for review.

1. In May 1998, then-Massachusetts Attorney General Scott Harshbarger proposed the regulations on tobacco advertising that are challenged in this case. JA 102. In November of the same year, while the proposed regulations were still pending for public notice and comment, the Attorneys General of 46 States (including Massachusetts) settled several lawsuits against the undersigned Petitioners by entering into a "Master Settlement Agreement" (MSA). *See* JA 259-71, 272-82. In addition to agreeing to pay the States more than $200 billion over 25 years (of which about $300 million per year would go to Massachusetts), the four manufacturers who signed the MSA voluntarily agreed to substantial restrictions on their outdoor advertising, including a prohibition on the use of billboards, a ban on the use of signs in arenas, stadiums, shopping malls, or video arcades, and a ban on any advertising outside retail stores that is larger than 14 square feet. JA 259-60, 263-64. The MSA expressly excluded from these voluntary restrictions, *inter alia*, any advertising outside retail stores that is *less* than 14 square feet. JA 259-60.

Despite obtaining the cigarette manufacturers' agreement to these limitations on advertising, the Massachusetts Attorney General went forward with the proposed tobacco regulations, which were formally promulgated on January 22, 1999. Although the MSA and its accompanying consent decree also contain an explicit prohibition on any advertising that directly or indirectly targets minors, JA 260, 274, the Attorney General asserted that the proposed regulations' severe restrictions on advertising were necessary to protect minors from the health risks of tobacco products. 940 C.M.R. § 21.01; JA 251; 1st Cir. JCA 387-89. These regulations prohibit virtually all outdoor advertising of tobacco and sharply limit indoor advertising as well. As described by the Attorney General, the theory of the regulations is that, in order to prevent minors from being influenced by tobacco advertisements addressed to adult smokers, *all* tobacco advertising must effectively be

eliminated from public areas where it might be seen by children. 1st Cir. JCA 539-41.[1]

Three provisions of these regulations are at issue here. First, 940 C.M.R. § 21.04(5)(a) effectively eliminates the use of outdoor advertising to provide truthful brand, availability, price, and other information to adult consumers of tobacco products. Specifically, § 21.04(5)(a) prohibits manufacturers, distributors, and retailers of tobacco products from using any "[o]utdoor advertising" of cigarettes and smokeless tobacco products in "any location that is within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school." Pet. App. 111a. Another provision of the regulations uses virtually identical language to impose similar restrictions on cigar advertising. 940 C.M.R. § 22.06(5), Pet. App. 123a.

The number of locations that trigger the 1,000 foot zone is so extensive that the resulting area covered by the regulations includes most of the heavily populated areas of Massachusetts. A detailed geographical analysis of the State's three largest cities revealed that between 87 and 91 percent of the land area of those cities was covered by § 21.04(5)(a)'s flat prohibition on outdoor advertising. JA 161-67. The severity of § 21.04(5)(a)'s prohibition on "outdoor advertising" is further magnified by the fact that the term is defined to include, not only advertising that is actually "outside," but also any advertising that is "within a retail establishment that is directed toward or visible from the outside of the establishment." 940

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[1] In issuing the regulations, the Attorney General relied upon his authority to declare certain practices to be *per se* an "unfair and deceptive act or practice" under Mass. Gen. Laws ch. 93A, § 2. Pet. App. 127a. It is undisputed, however, that the regulations do *not* require any showing of falsity; for purposes of summary judgment, the Attorney General was willing to assume "that the tobacco advertisements at issue here are truthful, nonmisleading speech about a lawful activity." Pet. App. 17a.

C.M.R. § 21.04(5)(a), Pet. App. 111a. The term "advertising," in turn, is sweepingly defined to include "any oral, written, graphic or pictorial statement or representation . . . the purpose or effect of which is to promote the use or sale" of cigarettes or smokeless tobacco products. *Id.*, § 21.03, Pet. App. 107a.

Second, 940 C.M.R. § 21.04(5)(b) provides that, *inside* any retail establishment that is accessible to minors and that is within the same 1,000-foot zone, no portion of any advertisement of cigarettes or smokeless tobacco may be "placed lower than five feet from the floor." Pet. App. 111a. Again, another section of the regulations uses virtually identical language in imposing the same restrictions on cigar advertising in Massachusetts. 940 C.M.R. § 22.06(5)(b), Pet. App. 123a.

Third, 940 C.M.R. § 21.04(2)(c) and (d) severely restrict the visible display of tobacco products in retail outlets by requiring that cigarettes and smokeless tobacco be placed "out of the reach of all consumers, and in a location accessible only to outlet personnel." Pet. App. 109a.[2] Subsections 22.06(2)(c) and (d) of the same regulations impose identical restrictions on the display of cigar products. Pet. App. 121a.

2. The Petitioners in No. 00-596 are four cigarette manufacturers (Lorillard Tobacco Co., Brown & Williamson Tobacco Corp., R.J. Reynolds Tobacco Co., and Philip Morris Inc.) and a maker of smokeless tobacco products (U.S. Smokeless Tobacco Company). In May 1999, Petitioners filed separate federal actions for declaratory and injunctive relief challenging various aspects of the regulations. A similar lawsuit was also filed by eight cigar companies, and all of the actions were ultimately consolidated. The cigarette companies

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[2] All four of the undersigned Petitioners challenge § 21.04(5)(a) and (b) on both preemption and First Amendment grounds. In this Court, only Petitioners Brown & Williamson Tobacco Corporation and Lorillard Tobacco Company challenge § 21.04(2), and (as in the proceedings below) this provision is challenged only on First Amendment grounds.

alleged that several of the regulations were preempted by § 5(b) of the Federal Cigarette Labeling and Advertising Act (FCLAA), 15 U.S.C. § 1334(b), which provides that States shall not impose any "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion" of cigarettes. Petitioners also alleged that several of the regulations violated the First Amendment.

On December 2, 1999, the district court granted partial summary judgment to the Attorney General, holding that § 5(b) of the FCLAA did not preempt either the outdoor advertising prohibition (§ 21.04(5)(a)) or the ban on indoor advertisements that were less than five feet from the floor (§ 21.04(5)(b)). Pet. App. 59a-60a. The district court relied on its understanding of the "purpose" and legislative history of the FCLAA to conclude that, notwithstanding the breadth of the statute's plain language, "*location-based* restrictions [on advertising] are not preempted by the Act." Pet. App. 56a (emphasis added). Because § 21.04(5) outlawed tobacco advertising only if it was placed "outdoor[s]" or at "ground-level," the district court held that it was a location restriction that was not preempted. *Id.*

Shortly thereafter, the district court issued a second order granting summary judgment to the Attorney General on all but one of the First Amendment claims. The court rejected Petitioners' threshold contention that, because the regulations effectively suppressed all tobacco advertising in public areas, a heightened standard of scrutiny should apply. Pet. App. 66a. In doing so, the court held that the "standard of review for commercial speech restrictions" turned on the "social benefits of the advertised product," so that a court would undertake a more searching review of advertising restrictions involving "socially- or politically-important products." *Id.* Because cigarette advertising was, in the district court's view, "functional pornography," *id.* at 61a, that promoted a product with "no readily discernable social or health benefits," *id.* at

66a, there was "no compelling reason to apply a heightened standard." *Id.* at 68a. Applying the four-part test set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), the district court upheld the outdoor advertising restrictions in § 21.04(5)(a) and the display ban in § 21.04(2), but the court concluded that the Attorney General had wholly failed to support the indoor advertising limitations in § 21.04(5)(b). Pet. App. 82a-83a.

3. The court of appeals affirmed in part and reversed in part, upholding in their entireties the advertising and display regulations relevant here. Pet. App. 45a. With respect to the preemption claims, the court declined to adopt what it termed a "hyper-literal" reading of the statutory phrase "with respect to the advertising or promotion of cigarettes." Pet. App. 10a. Instead, the court concluded that the sorts of restrictions on tobacco advertising at issue here do "not impose obligations 'with respect to' . . . advertising as that phrase is used in § 1334(b)." *Id.* (quotation omitted). Relying upon its view of Congress' underlying "purposes" in enacting the FCLAA, the court of appeals held that, in light of the States' traditional power to prescribe local zoning restrictions on the placement of advertisements, Respondent's regulations were "location restrictions" that did not "present the kind of 'diverse, nonuniform, and confusing' advertising standards with which Congress was concerned when it enacted the FCLAA." *Id.* at 13a & n.7 (quoting 15 U.S.C. § 1331).

The court of appeals also rejected Petitioners' contention that the advertising and display restrictions violated the First Amendment. Pet. App. 14a. In determining what level of scrutiny to apply, the court expressly agreed with Petitioners that the regulations were "content-based." As the court observed, "[a]dvertising of other products [than tobacco] is not restricted by the regulations, nor is tobacco-related speech that has a purpose or effect other than promotion, such as public health campaigns." *Id.* Despite this conclusion, and despite

what it acknowledged were "recent rumblings from members of the Supreme Court and others suggesting that the *Central Hudson* test may be in need of minor or major modification," the court nonetheless concluded that, under existing precedent, it was "bound to apply the *Central Hudson* test, as is, to this case." *Id.* at 16a.

Applying *Central Hudson*, the court of appeals noted that, for purposes of summary judgment, the Attorney General had conceded that "the tobacco advertisements at issue here are truthful, nonmisleading speech about a lawful activity." Pet. App. 17a. The court also concluded that the State's interest in reducing tobacco consumption by minors was "substantial." *Id.* In evaluating whether the Attorney General had demonstrated that the proposed regulations would "directly advance" that interest, the court held that it was sufficient for Respondent to rely upon the "'common-sense' argument . . . that advertising has some cause-effect relationship with consumption" and to submit a collection of studies and articles culled from governmental reports and various publications. *Id.* at 26a. By contrast, the court treated Petitioners' substantial evidentiary presentation (including expert affidavits) as largely irrelevant, concluding that the materials presented by the Attorney General were sufficient to permit him reasonably to conclude "that advertising restrictions will reduce tobacco use among young people." *Id.* And although the court acknowledged that the Attorney General's showing with respect to smokeless tobacco and cigars was substantially weaker, the court held that these other products were properly subjected to the same regulations "as part of a rational and well-founded comprehensive tobacco regulatory scheme." *Id.* at 28a.

Applying the fourth and final prong of the *Central Hudson* test, the court of appeals concluded that the regulations were sufficiently "'narrowly tailored to achieve the desired objective.'" Pet. App. 29a (citation omitted). The court held

that the 1,000-foot benchmark was not arbitrary because it had been copied from the FDA's proposed outdoor advertising regulations—even though the Attorney General conceded in the district court that the distance "was based on the [FDA's] analysis of the visibility of large billboards," as opposed to the smaller signs (no larger than 14 square feet) permitted by the MSA. Pet. App. 80a-81a. The court of appeals acknowledged that the record showed that the effect of using a 1,000-foot rule in Massachusetts would be to make all outdoor tobacco advertising illegal in up to 90% of the land area of the State's major cities, but still concluded that the regulations were adequately tailored because these were all "areas where children are more likely to be." Pet. App. 30a.

The court of appeals also rejected Petitioners' contention that the *indoor* advertising restrictions had not been shown to be narrowly tailored. The district court had invalidated these restrictions, largely because Respondent presented no evidence to support them other than to point to the FDA regulations, which did *not* regulate indoor advertising. Pet. App. 31a. The court of appeals expressed "misgivings" about the plausibility of Respondent's assumption that minors under five feet tall will not look above eye-level, but it nonetheless reversed the district court on this issue, holding that "such determination falls within that range of reasonableness in which the Attorney General is best suited to pass judgment." *Id.*[3]

[3] For similar reasons, the Court of Appeals also rejected Petitioners' First Amendment challenge to the product display restrictions in § 21.04(2)(c), (d) and § 22.06(4)(c), (d). Pet. App. 35a-37a.

SUMMARY OF ARGUMENT

1. Section 5(b) of the Federal Cigarette Labeling and Advertising Act (FCLAA) preempts Massachusetts' tobacco-advertising regulations. The First Circuit's conclusion that the regulations do not impose requirements "with respect to . . . advertising" within the meaning of § 5(b) disregards the FCLAA's text, its history, and *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

a. Section 5(b) preempts any state law imposing a "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion" of cigarettes. 15 U.S.C. § 1334(b). The phrase "with respect to . . . advertising" embraces any law regarding, concerning, or referring to advertising. Because the Massachusetts regulations expressly restrict "advertising," they constitute a regulation "with respect to" advertising within the plain meaning of § 5(b). That "plain language" must be applied, the Court has held, "unless there is good reason to believe Congress intended the language to have some more restrictive meaning." *Cipollone*, 505 U.S. at 521 (plurality) (quotation omitted). In this instance, no tenable basis exists for believing that Congress meant anything less than what it said.

b. Far from supporting a contrary interpretation, the Court's ERISA cases confirm this reading of § 5(b). While the Court has declined to hold that ERISA's preemption of all state laws "relat[ing] to" employee benefit plans extends to all legislation that could *indirectly* affect pension plans in some way, the Court has made clear that state laws involving *direct* regulation of ERISA plans "relate to" those plans within the meaning of the statute. *New York State Conference of Blue Cross & Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 668 (1995); *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 130 (1992). In the same manner, smoking-and-health-based requirements expressly directed to

tobacco "advertising" are regulations "with respect to" advertising and are therefore preempted by FCLAA § 5(b).

c. The First Circuit erred in holding that FCLAA preemption was limited to regulation of advertising content. The plain language of Section 5(b) preempts all smoking-and-health-based laws "with respect to . . . advertising," not just laws concerning the content of advertising. Congress knows how to limit the FCLAA's preemptive scope to content-based regulations, and in fact has done so in the past. It expressly did so in § 5(a), which preempts health-based regulation of the content of cigarette packaging, and it expressly did so in the pre-1969 version of § 5(b), which was similarly limited to preemption of the regulation of advertising content. The First Circuit's contrary view would read into the FCLAA a content limitation that Congress itself rejected over thirty years ago. And, in doing so, the First Circuit's interpretation would frustrate the FCLAA's purpose of "protecting the national economy from the burden imposed by diverse, nonuniform, and confusing cigarette labeling and advertising regulations." *Cipollone*, 505 U.S. at 514.

2. Massachusetts' tobacco-advertising regulations also violate the First and Fourteenth Amendments.

a. The First Circuit erred in assuming that all content-based restrictions on commercial speech should receive intermediate scrutiny. Because the government's greater power over commercial speech arises only as a consequence of its authority to regulate commercial transactions, "there is far less reason to depart from the rigorous review that the First Amendment generally demands" when the government engages in content-based regulation of commercial speech "for reasons unrelated to the preservation of a fair bargaining process." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (plurality). The lesser protection for commercial speech does not mean that the government may make any content-based

distinction it wants, but only that it may regulate content based on the "characteristics of commercial speech that justif[y] depriving it of full First Amendment protection." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

Under these standards, Massachusetts' regulations should receive, and cannot survive, strict scrutiny. There is no dispute that the tobacco advertising prohibited by Massachusetts is truthful and nonmisleading. Moreover, the challenged regulations are ~~not~~ based on the claimed elimination of particularized commercially harmful devices used in advertising tobacco. On the contrary, they are based on the censorial theory that *merely* by expressing a favorable message about tobacco, even the smallest storefront advertisement must be suppressed lest it be seen by minors who may get the wrong idea from it. Because Massachusetts' regulations are "directed not at any commercial aspect of the prohibited advertising but at the ideas conveyed," the regulations strike at "the core of First Amendment values" and must be subjected to strict scrutiny. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 & n.28 (1977). These onerous regulations plainly cannot survive such scrutiny.

b. By suppressing virtually any outdoor advertisement that contains any favorable message about tobacco, the regulations also discriminate on the basis of viewpoint. That makes "the violation of the First Amendment . . . all the more blatant," *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995), and makes the case for applying strict scrutiny even more compelling. For this independent reason, the regulations receive, and fail to satisfy, strict scrutiny.

c. In any event, even under *Central Hudson* the regulations cannot survive. Massachusetts has not shown that its restrictions directly and materially advance its interest in curbing underage smoking. No study has examined whether, in light of the advertising restrictions contained in the Master

Settlement Agreement plus extensive state-sponsored anti-tobacco advertising, the regulations would do anything more than lend the most limited incremental support to Massachusetts' policies. Moreover, the availability of non-speech measures (*e.g.*, more vigorous enforcement of laws prohibiting tobacco sales to minors and outlawing underage purchases of tobacco products), combined with the sheer scope of the advertising ban (comprising some 90% of the most heavily populated areas of Massachusetts), demonstrate that the regulations are anything but "narrowly tailored."

ARGUMENT

I. Massachusetts' Severe Limitations on the Display of Cigarette Advertising Impose Requirements "With Respect to . . . Advertising" Within the Meaning of the Preemption Provision of the Federal Cigarette Labeling and Advertising Act.

In concluding that Massachusetts' advertising regulations were not preempted by § 5(b) of the FCLAA, 15 U.S.C. § 1334(b), the court of appeals held that the preemption of state regulations "with respect to the advertising" of cigarettes should be read only to apply to regulation of the *content* of cigarette advertising. Pet. App. 9a-13a. This construction of the FCLAA is inconsistent with the statutory text, the legislative history, and this Court's decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (quotation omitted). Moreover, the First Circuit's reading of § 5 undermines Congress' purpose in enacting the FCLAA, which was to avoid the sort of crippling and nonuniform local regulations of tobacco advertising that have been upheld in this and other cases. Indeed, the lower court's restrictive reading of § 5 threatens to permit state regulations that prohibit almost all cigarette advertising—precisely what Congress sought to avoid. The decision below must be reversed.

1. The First Circuit's decision must be reversed for the simple reason that its construction of § 5(b) is inconsistent with the plain language of the statute.

a. The Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 *et seq.*, establishes a comprehensive federal program concerning the advertising and promotion of cigarettes. In its current form, the Act requires that cigarette packages sold or distributed in the United States contain certain health warnings, *id.*, § 1333, bans radio and television advertising of cigarettes, *id.*, § 1335, confirms the authority of the Federal Trade Commission (FTC) to regulate "unfair or deceptive acts or practices in the advertising of cigarettes," *id.*, § 1336, and requires the FTC to submit annual reports to Congress concerning cigarette advertising, *id.*, § 1337. In crafting this federal statutory scheme, Congress chose to preempt *all* smoking-and-health-based State regulation "*with respect to*" cigarette "advertising." Section 5(b) of the Act provides in its entirety:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334(b). Under the Supremacy Clause of Article VI of the Constitution, state laws that conflict with § 5(b) are "without effect." *Cipollone*, 505 U.S. at 516 (quotation omitted).

The court of appeals acknowledged that the Massachusetts regulations imposed "prohibition[s] based on smoking and health." Pet. App. 13a n.6. The court nonetheless held that the regulations were not preempted because the challenged restrictions on cigarette advertising did not impose requirements or prohibitions "with respect to . . . advertising." *Id.* at 10a-13a. The court held that "*with respect to*

advertising" means only regulations that "'impose *content and format requirements* on advertising information.'" *Id.* at 10a (quotation omitted) (emphasis added). Notwithstanding the breadth of the express statutory language, the court held that the phrase "with respect to . . . advertising" does not include regulations concerning "the *placement and manner* of outdoor advertising." *Id.* at 12a (emphasis added). The First Circuit's importation of this content/location distinction into § 5(b) is demonstrably wrong.

b. In construing the phrase "with respect to . . . advertising," one must "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *FMC Corp. v. Holliday*, 498 U.S. 52, 57 (1990). "If [a] statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).

Thus, as this Court held in *Cipollone*, the "plain language" of § 5(b) must be given effect "'unless there is good reason to believe Congress intended the language to have some more restrictive meaning.'" 505 U.S. at 521 (plurality) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)); *id.* at 532 (Blackmun, J., joined by Kennedy and Souter, JJ., concurring in part and dissenting in part) (an interpreting court must begin with the "ordinary meaning" of the statutory language) (quoting *FMC Corp.*, *supra*); *id.* at 548 (Scalia, J., joined by Thomas, J., concurring in part and dissenting in part) (stating that the language of § 5(b) "should be given its ordinary meaning") (citing *FMC Corp.*, *supra*; *Shaw*, *supra*).

The First Circuit's construction of § 5(b) cannot be reconciled with the statutory text. The Massachusetts regulations, by their terms, explicitly and directly restrict the

placement of cigarette "advertising." *See* 940 C.M.R. § 21.04(5), Pet App. 111a. Giving the statutory words and phrases their ordinary meaning, there can be no question that the regulations impose requirements and prohibitions "with respect to the advertising" of cigarettes. In common parlance, the phrase "with respect to" means "as regards," or "insofar as concerns," or "with reference to." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1934 (1976). To say, as the First Circuit did, that Massachusetts' severe regulation of the placement of "advertising" does not *regard* or *concern* or *have reference to* "advertising" defies standard English usage and common sense. The First Circuit's contention that a direct regulation of "advertising" is not a regulation "with respect to . . . advertising" is "at odds . . . with the plain words" of the FCLAA, *Cipollone*, 505 U.S. at 521 (plurality), and disregards the "ordinary meaning" of the statutory language. *Id.* at 532 (Blackmun, J., joined by Kennedy and Souter, JJ.).

c. The First Circuit sought support for its construction of § 5(b) in cases construing the preemption provision of ERISA (Pet App. 11a-12a). In fact, the ERISA analogy demonstrates the lower court's error.

Section 514(a) of ERISA preempts "all State laws insofar as they . . . relate to any employee benefit plan." 29 U.S.C. § 1144(a). This Court has observed that, because § 514(a)'s language is so "clearly expansive," one "might be excused for wondering, at first blush, whether the words of limitation ('insofar as they . . . relate') do much limiting." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). Difficulty arises in cases where the party urging preemption asserts that the regulations, while not mentioning employee benefit plans, nevertheless have some *indirect* effect on such plans. All economic regulations have *some* effect, and thus "relate" in some way to, employee pension plans. Thus, the Court has struggled with defining the extent to which § 514(a) preempts

state laws that have only an *indirect* connection to, or effect on, ERISA plans. *See, e.g., Travelers*, 514 U.S. at 656.

Relying upon *Travelers*, the First Circuit concluded that, because the applicability of § 5(b) of the FCLAA turns on whether a state law imposes obligations "with respect to . . . advertising," it is "similar" to ERISA's broad preemption provision and likewise cannot be viewed with "'uncritical literalism.'" Pet. App. 11a-12a (quoting *Travelers*, 514 U.S. at 655). Having thus liberated itself from the confines of the text, the court of appeals felt free to decide for itself what sort of regulations should be preempted as inconsistent with congressional "policy" in enacting the FCLAA. Pet. App. 12a-13a.

To the extent § 514 of ERISA provides a useful analogy, it proves that the First Circuit's reading of § 5(b) was exactly wrong. As this Court noted in *Travelers*, the interpretive problem in ERISA preemption arises only for state laws that do *not* "make reference to" ERISA plans: in these cases, it can be difficult to define the point at which, even though the law does not target ERISA plans, it "produce[s] such acute, albeit indirect, economic effects, by intent or otherwise," that the law must be said to "relate to" ERISA plans. 514 U.S. at 668. By contrast, the Court has consistently held that state laws involving "direct regulation of ERISA plans" obviously "relate to" such plans and are preempted by § 514(a). *Id.*; *see also id.* at 656 (laws that "make 'reference to' ERISA plans" are preempted) (quoting *Shaw*, 463 U.S. at 96-97); *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 130 (1992) (challenged District of Columbia law "specifically refers to welfare benefit plans regulated by ERISA and on that basis alone is preempted"); *DeBuono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 813 (1997) (noting that "it ha[s] not been necessary to rely on the expansive character of ERISA's literal language in order to find pre-emption" in cases

where "the state laws at issue . . . had a clear 'connection with or reference to,' ERISA benefit plans") (citation omitted).

Applying the same approach to § 5(b), there may well be room for debate as to when a state regulation not mentioning "advertising" has sufficient effect on advertising that it should be deemed to be a "requirement or prohibition . . . with respect to . . . advertising." *Compare Cipollone*, 505 U.S. at 524, 528 (plurality) *with id.* at 555 (Scalia, J., joined by Thomas, J., concurring in part and dissenting in part). But a state law—such as the Massachusetts regulations challenged here—that *specifically refers* to and regulates "advertising" plainly imposes obligations "with respect to . . . advertising" and is therefore preempted.

2. Apart from its utter disregard of the plain meaning of the phrase "with respect to . . . advertising," the First Circuit's construction of § 5(b) is inconsistent with the text and history of the FCLAA in several other respects.

First, the court of appeals' content/location distinction fails for the simple reason that nothing in the language of § 5(b) suggests that Congress intended the provision to apply only to state laws regulating the *content* of cigarette advertising. *See, e.g., Morales v. Trans World Airlines*, 504 U.S. 374, 385 (1992) (rejecting state attorney general's narrow reading of the preemption clause in 49 U.S.C. App. § 1305(a)(1) because "[h]ad the statute been designed to pre-empt state law in such a limited fashion," Congress would have chosen a narrower wording). Congress could have chosen to limit § 5(b) to state laws that impose requirements or prohibitions "with respect to the *content* of advertising," but it did not do so. Congress instead chose language that applies to state laws "with respect to . . . advertising" *simpliciter*. As this Court stated in construing § 5(b) in *Cipollone*, "'[w]e must give effect to this plain language unless there is good reason to believe that Congress intended the language to have some more restrictive

meaning.'" 505 U.S. at 521 (plurality) (quoting *Shaw*, 463 U.S. at 97). The First Circuit not only fails to give effect to the plain language, it effectively rewrites the statute, adding terms that Congress did not see fit to include. *See, e.g., Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 169 (1993) ("[W]e may not add terms or provisions where Congress has omitted them.")

Second, the importation of a "content" limitation into § 5(b) cannot be reconciled with other provisions of the FCLAA. In its current version, § 5 contains a *second* preemption provision in subsection (a) that reads as follows:

> No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

15 U.S.C. § 1334(a). Unlike subsection (b), subsection (a) thus uses language referring explicitly to content, limiting its preemption to laws or regulations that require "statement[s]" on cigarette packages. The *absence* of such limiting language in the very next subsection of the statute, *i.e.*, in subsection (b), establishes that the latter provision was intended to mean what it says, extending preemption beyond mere regulation of content. *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

Third, the First Circuit's narrowing construction of the statute cannot be reconciled with Congress' amendments to the FCLAA. The significantly broader language in subsection 5(b) is not an accident. Congress chose to amend and expand the original, much narrower preemption provision first enacted in 1965. In its original form, § 5(b) did for advertising what subsection (a) did for product labeling. In language very

similar to subsection (a), the former § 5(b) only addressed regulation of *content* of advertising: "'[n]o *statement* relating to smoking and health shall be required *in the advertising* of any cigarettes . . . .'" Pub. L. No. 89-92, § 5(b), 79 Stat. 282, 283 (1965) (emphasis added).

Effective July 1, 1969, however, Congress completely rewrote subsection (b), so that it now reaches beyond preemption of regulation of "*statements*" in advertising to preemption of any smoking-and-health-based regulation "*with respect to* . . . advertising." Pub. L. No. 91-222, §§ 2, 3, 84 Stat. 87, 88 (1970) (rewriting, *inter alia*, section 5 of the FCLAA). As this Court noted in *Cipollone*, the resulting preemptive effect is "much broader" and cannot be limited to laws regulating the content of advertising:

> Compared to its predecessor in the 1965 Act, the plain language of the pre-emption provision in the 1969 Act is much broader. First, the later Act bars not simply "statement[s]" but rather "requirement[s] or prohibition[s] . . . imposed under State law." *Second, the later Act reaches beyond statements "in the advertising" to obligations "with respect to the advertising or promotion" of cigarettes.*

505 U.S. at 520 (plurality) (emphasis added). The First Circuit's narrow and countertextual reading of § 5(b) must be rejected because it fails to give effect to these significant changes in the statutory language. *American Nat'l Red Cross v. S.G.*, 505 U.S. 247, 263 (1992) (construction that fails to give effect to changes in language is strongly disfavored).

3. The First Circuit also sought to defend its countertextual construction of § 5(b) on the ground that state laws that do not regulate the *content* of cigarette advertising "do not interfere" with the "labeling and advertising scheme established by Congress" and therefore do not present the particular kind of "'diverse, nonuniform, and confusing' advertising standards

with which Congress was concerned when it enacted the FCLAA." Pet. App. 12a-13a. Thus, the court of appeals concluded that its rejection of the plain meaning of § 5(b) was supported by a "'fair understanding of congressional purpose.'" *Id.* at 9a (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996)). This argument is unavailing.

The First Circuit's focus on whether the regulations "interfere" with federal policy is more appropriate for *implied* preemption cases than for the construction of an express preemption clause. *See, e.g., Geier v. American Honda Motor Co.*, 529 U.S. 861, 120 S. Ct. 1913, 1927 (2000) ("[T]his Court traditionally distinguishes between 'express' and 'implied' pre-emptive intent, *and treats 'conflict' pre-emption as an instance of the latter.*") (emphasis added). By contrast, in construing *express* preemption provisions, the Court has consistently held that it is the language of the preemption provision that controls, not whether state law "interferes" with the purposes of the federal scheme. *See, e.g., Morales*, 504 U.S. at 386-87 ("Nothing in the language of § 1305(a)(1) suggests that its 'relating to' pre-emption is limited to *inconsistent* state regulation."); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 829 (1988) ("The pre-emption provision . . . displace[s] all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements").

Even if the extent of "interference" were a relevant consideration, the court of appeals was wrong in concluding that the onerous "location" restrictions adopted by Massachusetts do not interfere with federal policy established by the FCLAA. Massachusetts' detailed advertising regulations frustrate the FCLAA's purpose of "protecting the national economy from the burden imposed by diverse, nonuniform, and confusing cigarette labeling and advertising regulations." *Cipollone*, 505 U.S. at 514. The 1969 Amendments to § 5(b) were adopted precisely "to avoid the

chaos created by a multiplicity of conflicting regulations." S. Rep. No. 91-566 at 12, *reprinted in* 1970 U.S.C.C.A.N. 2652, 2663. The First Circuit's decision sanctions precisely that chaos: as illustrated by the Appendix to the Petition in this case, there are now literally scores of different local ordinances that impose special restrictions only on tobacco advertising, impeding Congress' purpose in enacting the FCLAA. Pet. App. 128a-34a.

Moreover, the *Cipollone* Court noted that among the state proposals that led to the expansion of § 5(b)'s preemption clause was a proposed California statute that, *inter alia*, would have prohibited all print cigarette advertisements. 505 U.S. at 515 & n.11. As Justice Blackmun (joined by Justices Kennedy and Souter) observed in his separate opinion in *Cipollone*, the 1969 amendment to § 5(b) was intended, at a minimum, "to ensure that a State could not do through negative mandate (*e.g., banning all cigarette advertising*) that which it already was forbidden to do through positive mandate (*e.g.*, mandating particular cautionary statements)." 505 U.S. at 539 (emphasis added). The decision below, approving a ban on outdoor advertising in up to 90% of Massachusetts' most heavily populated areas, undermines FCLAA policy by permitting States, under the guise of preventing children from viewing tobacco advertising, to impose precisely the sort of near-total bans that the FCLAA sought to forestall. JA 161-67.

4. The First Circuit also reasoned that a "content" limitation should be read into § 5(b) in order to preserve state police power in accordance with the "presumption against preemption." Pet. App. 10a-11a (quotation omitted). But in doing so, the court of appeals ignored this Court's holding in *Cipollone* that the "presumption against pre-emption" cannot be invoked *in disregard of the statutory text*. *Cipollone*, 505 U.S. at 523 (plurality) (notwithstanding any "presumption against pre-emption," the phrase "state law" in § 5(b) could not "fairly" be construed to exclude state common law); *id.* at 548-

49 (Scalia, J., joined by Thomas, J.) (agreeing that § 5(b) covered common law claims, but rejecting any presumption against preemption). To the extent that there is a "presumption against preemption," it can be invoked only when there is *textual* ambiguity that would warrant use of this canon of construction. *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 417 (1998) (where the language is clear, there is "no reason . . . to resort to the canons of construction that we use to resolve doubtful cases"). Moreover, the First Circuit's argument on this score is something of a red herring. Section 5(b) does not impinge upon the traditional police power of States to adopt *general* regulations concerning the placement of advertisements. Section 5(b) limits the States' power to adopt tobacco-specific regulations "with respect to . . . advertising," a limitation that Congress had the power, and intended, to impose.

Similarly, the court of appeals was wrong in asserting that its construction of § 5(b) was necessary to ensure that Petitioners could be prevented "'from handing out free cigarettes in an elementary school yard.'" Pet. App. 10a (citation omitted). The hypothetical is, of course, counterfactual: as part of the resolution of the various lawsuits brought by state attorneys general, Petitioners have affirmatively acceded to the entry of permanent injunctions, in all 50 States, that specifically prohibit them from "target[ing] Youth" in the "advertising, promotion or marketing" of cigarettes. JA 260, 274.

The hypothetical is also, in any event, a straw man. In *Morales*, this Court confronted a similar parade of horribles. The Texas attorney general objected that a plain language reading of the Airline Deregulation Act's preemption clause would "lead[] to pre-emption of state laws against gambling and prostitution as applied to airlines" and might "give the airlines *carte blanche* to lie to and deceive consumers." 504 U.S. at 390. The Court rejected this argument, noting that,

first, it was doubtful whether such laws would be preempted and, second, the Federal Government retained authority to prescribe any such conduct. *Id.* at 390-91. Both points are relevant here. It is questionable whether the term "advertising," as used in § 5(b), would be thought to include direct and intentional solicitation of *unlawful* sales, and thus there is no reason to believe that state laws prohibiting the distribution of cigarettes to minors would be preempted. Moreover, Congress has made clear that regulation related to the perceived impact of cigarette advertising on minors is to be addressed at the federal level. As originally enacted in 1965, § 5(b) prohibited *both* state and federal agencies from regulating the content of cigarette advertising. This provision was criticized as providing "no meaningful defense" against advertising "designed to make cigarette smoking appeal[] to young people." *See* S. Rep. No. 91-566 at 19, 1970 U.S.C.C.A.N. at 2667. Congress responded, *not* by restoring power to the States, but by accelerating the phase-out of most of the 1965 Act's limitations on the jurisdiction of the Federal Trade Commission. *See* Pub. L. No. 91-222, § 2, 84 Stat. at 89 (amending, *inter alia*, § 7 of the FCLAA) (codified, as later amended, at 15 U.S.C. § 1336). As in *Morales*, Congress' deliberate and express retention of federal authority in the area is sufficient to refute the court of appeals' reliance on a parade of horribles. 504 U.S. at 390-91. The First Circuit's argument reduces to the view that it would be better if Congress had not preempted States in this area. Congress thought otherwise, and its word in the FCLAA controls.

* * *

There is "no 'good reason to believe' that Congress meant less than what it said [in § 5(b)]." *Cipollone*, 505 U.S. at 522 (plurality). The court of appeals erred in holding otherwise, and its judgment should be reversed.

II. In Broadly Banning Speech Promoting Tobacco Products, the Massachusetts Regulations Violate the First and Fourteenth Amendments.

The court of appeals also erred in rejecting Petitioners' First Amendment challenge to the Massachusetts advertising restrictions. Although Massachusetts had several alternative regulatory tools available to assist in reducing the incidence of youth smoking—including stricter enforcement of existing prohibitions against *sales* of tobacco to minors or enactment of a prohibition against *purchases* of tobacco by minors—the State instead chose to adopt what amounts to a near-total ban on the public display of truthful tobacco advertisements.[4] This action was taken by a single state official, the Attorney General, as part of his self-declared "war against Big Tobacco." JA 248. Applying the test set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), the First Circuit upheld this heavy-handed approach, dismissing the near-elimination of public tobacco

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[4] While Massachusetts (like most States) already precludes retailers from selling tobacco products to minors, Mass. Gen. Laws Ann. ch. 270, § 6A (West 2000), it lags behind the many other States that have enacted laws that prohibit minors from purchasing tobacco. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-3622 (West 2000) (illegal for minors to purchase cigarettes); Cal. Penal Code § 308 (same). Massachusetts also has yet to implement a retailer licensing scheme, similar to the program for alcoholic beverages, that would closely regulate retail sales of tobacco. Other States have adopted such measures, *see, e.g.*, Minn. Stat. § 461.12 (2000), and Respondent himself concedes that it could "drastically reduce the sale of tobacco products to minors." 1st. Cir. JCA 2937. Moreover, although strict enforcement of age verification has been shown to sharply reduce the ability of minors to purchase cigarettes, *see, e.g.*, H. Landrine, *Asking Age and Identification May Decrease Minors' Access to Tobacco*, 25 Preventive Medicine 301-06 (1996) (California study showed that age verification resulted in refusal of sales to minors 99% of the time), the Attorney General did not wait for the age-verification elements of the new regulations to be implemented before adopting speech restrictions.

advertising to adults as amounting merely to "ordinary commercial speech regulation[]." Pet. App. 16a n.8.

The court of appeals' analysis fails for two reasons. First, the court erred in applying *Central Hudson*'s "intermediate scrutiny" standard to Massachusetts' advertising regulations. Those regulations impermissibly regulate the content of commercial speech based solely on its expression of an idea—namely, *any* favorable speech concerning tobacco products—rather than on any particular commercial aspect of the speech that directly threatens the integrity or legality of the transactions proposed. Indeed, because the regulations explicitly suppress, over a wide geographic area, any public expression of disfavored messages that promote the use of tobacco, the regulations are viewpoint-discriminatory in their operation and effect. Second, even under the *Central Hudson* test, Massachusetts has failed to establish that its severe advertising restrictions will materially reduce underage tobacco use or that the uncommon breadth of these regulations has been properly tailored to that objective. For these reasons, the regulations plainly violate the First Amendment.

A. Strict Scrutiny Governs Massachusetts' Impermissibly Content-Based Restrictions on Commercial Speech.

The court of appeals held that Massachusetts' suppression of tobacco advertising in as much as 90% of the largest cities in the State was an "ordinary commercial speech regulation[]" warranting only intermediate scrutiny under *Central Hudson*. Pet. App. 16a & n.8. That was wrong. Under the First Amendment principles set forth in this Court's cases, the appropriate level of review is strict scrutiny; and because the regulations plainly do not survive such scrutiny, they must be invalidated.

1. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the

expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *see also Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Because content-based regulation of speech "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace," *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991), the Court has stated that "[c]ontent-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

The Court has, however, adhered to a "limited categorical approach" in this area, holding that there are certain categories of expression in which the prohibition against content discrimination "applies differently" than it does "in the area of fully protected speech." *R.A.V.*, 505 U.S. at 383, 387. These "few limited areas" consist of certain categories of speech that have traditionally been thought to be wholly outside the protection of the First Amendment (such as libel, "fighting words," and obscenity), *id.* at 383; *see also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 n.7 (1983), and one category—commercial speech—that enjoys a "measure of First Amendment protection" that "is not absolute." *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 623 (1995); *see Bolger*, 463 U.S. at 65.

The more limited protection afforded to commercial speech arises largely from the fact that, by definition, it "is linked inextricably to commercial *activity*" that the government has power to regulate. *Friedman v. Rogers*, 440 U.S. 1, 10 n.9 (1979) (emphasis added); *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996) (plurality) ("[T]he State's power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is 'linked inextricably' to those transactions"); *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) ("[T]he State's interest in regulating the underlying transaction may give it a concomitant interest in

the expression itself."). In particular, the government's power to protect the fairness and integrity of commercial transactions has traditionally been thought to include the ability to impose restrictions against "[a]dvertising that is false, deceptive, or misleading" or that proposes "transactions which are themselves illegal." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383-84 (1977); *see also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457-58, 462 (1978). It is precisely because of this "greater potential for deception or confusion in the context of certain advertising messages" that "content-based restrictions on commercial speech *may* be permissible." *Bolger*, 463 U.S. at 65 (emphasis added).

Nonetheless, the idea that commercial speech is afforded more limited protection against content discrimination "must be taken in context." *R.A.V.*, 505 U.S. at 383. The power to proscribe particular speech "on the basis of *one* content element . . . does not entail the power to proscribe it on the basis of *other* content elements." *Id.* at 386 (emphasis in original). Thus, the lesser protection for commercial speech means not that the government may make *any* content-based distinctions it wants, but only that it may regulate content based on "the characteristics of commercial speech that justif[y] depriving it of full First Amendment protection." *Id.* at 388. Where the government engages in content-based regulation of commercial speech "for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands." *44 Liquormart*, 517 U.S. at 501 (plurality). Put simply, "[t]he State retains less regulatory authority when its commercial speech restrictions strike at 'the substance of the information communicated,' rather than the 'commercial aspect of [it]—with offerors communicating offers to offerees.'" *Id.* at 499 (quoting *Linmark Assoc., Inc. v. Willingboro*, 431 U.S. 85, 96 (1977)).

Accordingly, the government has greater power to regulate the content of commercial speech only when it "regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information." *44 Liquormart*, 517 U.S. at 501 (plurality). By contrast, where the government's content discrimination is "directed not at any commercial aspect of the prohibited advertising but at the ideas conveyed and form of expression," the regulation strikes at "the core of First Amendment values" and is presumptively unconstitutional. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 n.28 (1977); *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 497 (1995) (Stevens, J., concurring) ("Any 'interest' in restricting the flow of accurate information because of the perceived danger of that knowledge is anathema to the First Amendment[.]").

The fundamental First Amendment principles at work here are well illustrated by *R.A.V.*, in which the Court addressed a city ordinance banning "'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.'" 505 U.S. at 391. The Court invalidated the ordinance as impermissibly content-based because it selectively prohibited only those fighting words "addressed to one of the specified disfavored topics." *Id.* In response to the argument that the unprotected status of "fighting words" meant "that the government 'may regulate [them] freely,'" *id.* at 384, the Court held that "the power to proscribe [speech] on the basis of *one* content element . . . does not entail the power to proscribe it on the basis of *other* content elements." *Id.* at 386 (emphasis in original). Thus, for example, "the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government." *Id.* at 384. Of particular note here is the fact that the Court explicitly observed that the same limitation would apply in the commercial speech context:

> [A] State may choose to regulate *price* advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection), is in its view greater here. But a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion.

Id. at 388-89 (emphasis added) (citation omitted). Indeed, it could not be otherwise: if, as *R.A.V.* held, these restrictions on content discrimination apply to entirely unprotected categories of speech, they must also apply to commercial speech, which *is* protected.

The resulting limitation on the ability of the government to regulate commercial speech based on its content is fully consistent with the rationale of the general prohibition against content discrimination. *Simon & Schuster*, 502 U.S. at 116. If the basis of the government's content-based regulation of commercial speech "consists entirely of the very reason the entire class of speech at issue" is only entitled to lesser constitutional protection, "no significant danger of idea or viewpoint discrimination exists." *R.A.V.*, 505 U.S. at 388. "Such a reason, having been adjudged neutral enough" to justify depriving commercial speech of full First Amendment protection, "is also neutral enough to form the basis of distinction within the class." *Id.* Accordingly, when the government regulates commercial speech to protect consumers from misleading practices or requires beneficial disclosures, "the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review." *44 Liquormart*, 517 U.S. at 501 (plurality).

By contrast, where the government imposes a content-based restriction for reasons unrelated to the justification for according the speech lesser or no constitutional protection

(*e.g.*, a law prohibiting "obscenity which includes offensive political messages," *R.A.V.*, 505 U.S. at 388), the neutral reasons for treating the category of speech in question differently from fully protected speech do not support the government's classification. In such circumstances, the censorship concerns raised by content-based restrictions attach with full force, and the restriction must be subject to strict scrutiny. *See, e.g.*, *44 Liquormart*, 517 U.S. at 503 (noting that prohibitions on "truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching" and instead "usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth"); *cf. R.A.V.*, 505 U.S. at 382, 393-94 (concluding that St. Paul's ordinance banning certain categories of fighting words was "presumptively invalid" because it "create[d] the possibility that the city is seeking to handicap the expression of particular ideas").

2. Against the backdrop of these settled principles, the First Circuit's holding that *Central Hudson* provides the one-size-fits-all approach for evaluating commercial speech restrictions cannot be sustained. Under the court of appeals' erroneous view, First Amendment law would now contain the following remarkable anomaly: content-based distinctions among categories of *protected* truthful and nonmisleading commercial speech are to be judged under *Central Hudson*'s "intermediate scrutiny" standard, while (under *R.A.V.*) content-based distinctions among *unprotected* categories of speech are afforded strict scrutiny. 505 U.S. at 395 (holding that the St. Paul ordinance is not "narrowly tailored to serve compelling state interests").

There are yet further anomalies. This Court has, on more than one occasion, explicitly recognized that the *Central Hudson* test is "very similar" to the intermediate scrutiny standard used to determine "the validity of time, place, or manner restrictions." *United States v. Edge Broad. Co.*, 509

U.S. 418, 430 (1993); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 537 n.16 (1987). But the test for determining the constitutionality of a time, place, and manner restriction *presupposes* that the restriction is *content-neutral, i.e.*, that it is "justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)); *see also Consolidated Edison Co. of N.Y., Inc. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 536 (1980). Indeed, the Court has made clear that the absence of impermissible content-based discrimination is critical to the application of intermediate scrutiny: in *Ward*, the Court explained that it is precisely *because* time, place, and manner restrictions must be content-neutral that "the same degree of tailoring is not required of these regulations." 491 U.S. at 798 n.6. It is therefore obvious that intermediate scrutiny is neither designed, nor is it well-suited, to detect impermissibly content-based speech restrictions.

It is little wonder that a majority of the members of this Court have expressed misgivings about applying *Central Hudson* to the sort of commercial speech restrictions that raise the specter of impermissible content discrimination. In *44 Liquormart*, three Justices stated that intermediate scrutiny should not be applied to a commercial speech restriction if it regulates content "for reasons unrelated to the preservation of a fair bargaining process." 517 U.S. at 501 (Stevens, J., joined by Kennedy & Ginsburg, JJ.). Justice Thomas has likewise indicated that intermediate scrutiny is wholly inappropriate when the government uses commercial speech restrictions not to guard against "false or misleading advertising," but instead to "manipulat[e] consumer choices or public opinion through the suppression of accurate 'commercial' information." *Id.* at 520 (Thomas, J., concurring). And Justice Scalia has stated that he "share[s] Justice Thomas's discomfort with the *Central*

Hudson test." *Id.* at 517 (Scalia, J., concurring).[5] The common thread in these criticisms is clear: all of these Justices have expressed concerns about applying intermediate scrutiny to a restriction that regulates content based on characteristics of commercial speech *other* than those "that justif[y] depriving it of full First Amendment protection." *R.A.V.*, 505 U.S. at 388.

The skepticism expressed by these Justices about applying *Central Hudson* across-the-board to commercial speech restrictions is well founded, for *Central Hudson* itself indicated that "special care" would be required in reviewing certain types of commercial speech restrictions. In particular, *Central Hudson* stated that more careful review is required for "regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy." 447 U.S. at 566 n.9. While nonetheless establishing a "four-step analysis" for evaluating seemingly all commercial speech restrictions, *id.* at 566, *Central Hudson* noted that restrictions that involve wholesale suppression of ideas are unlikely ever to be constitutional: "[T]his Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, *either because it was deceptive or related to unlawful activity*." *Id.* (emphasis added).

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[5] These concerns echo and expand upon concerns expressed previously by Justices Brennan, Marshall, and Blackmun. *See Central Hudson*, 447 U.S. at 573 (Blackmun J., joined by Brennan, J., concurring) (noting that the majority's test "does not provide adequate protection for truthful, noncoercive commercial speech concerning lawful activities"); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 431, 436 (1993) (Blackmun, J., concurring) (suggesting that "truthful, noncoercive commercial speech concerning lawful activities is entitled to full First Amendment protection"); *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 350 (1986) (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting) ("I see no reason why commercial speech should be afforded less protection than other types of speech where, as here, the government seeks to suppress commercial speech in order to deprive consumers of accurate information concerning lawful activity.").

Moreover, the traditional explanations for distinguishing commercial from political expression do not apply when the government adopts content-discriminatory restrictions on the expression of truthful ideas in commercial advertising. The fact that commercial speech frequently is objectively "verifiable" by the speaker, *see Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 n.24 (1976), may supply a basis for providing greater deference to the government in proscribing false commercial speech than, say, false political speech, *compare New York Times v. Sullivan*, 376 U.S. 254 (1964). But it hardly provides a warrant for diluting review of facially discriminatory restrictions on truthful ideas in commercial speech. And even if "commercial speech may be more durable than other kinds" in view of the economic considerations that often surround it, *Virginia State Bd.*, 425 U.S. at 771 n.24, it does not follow that facially discriminatory restrictions on nonmisleading ideas pose "little likelihood" that commercial speech will be "chilled" or "forgone entirely," *id.* One glance at Massachusetts' unfolding regulatory regime proves the ease with which unchecked suppression of one form of commercial speech carries the risk that this perspective will in fact be "forgone entirely."

Accordingly, the Court should clarify that *Central Hudson*'s "intermediate scrutiny" standard applies only when the government regulates advertising based on those particular commercial aspects of the speech that justify affording lesser constitutional protection to commercial speech in the first place. In such a circumstance, the regulation would be content-based, but *permissibly* so. *R.A.V.*, 505 U.S. at 388; *44 Liquormart*, 517 U.S. at 501 (plurality). Where, by contrast, the government seeks to regulate commercial speech based on "the ideas conveyed and [the] form of expression," strict scrutiny must be applied. *Carey*, 431 U.S. at 701 n.28. *See also Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993) (invalidating challenged ordinance that discriminated

against commercial speech, noting that "the principal reason for drawing a distinction between commercial and noncommercial speech," preventing commercial harms, "ha[d] little, if any application" to the challenged local ordinance).

3. Under these standards, it is clear that the Massachusetts regulations are impermissibly content-based and must be subjected to strict scrutiny.

On the record before this Court, there is no dispute that the advertising prohibited by Massachusetts' regulations is truthful and nonmisleading. Pet. App. 17a. Nor can there be any doubt that the regulations discriminate on the basis of content. By their terms, the regulations apply to "any oral, written, graphic, or pictorial statement or representation . . . the purpose or effect of which is to *promote the use or the sale of the [tobacco] product*." 940 C.M.R. § 21.03 (emphasis added). As the First Circuit noted, because "[a]dvertising of other products is not restricted by the regulations," their focus "is plainly content-based." Pet. App. 14a.

Moreover, Massachusetts' restrictions on outdoor tobacco advertising are not based on "the characteristics of commercial speech that justif[y] depriving it of full First Amendment protection." *R.A.V.*, 505 U.S. at 388. There is no claim that Massachusetts' content-discriminatory regime regulates any particular aspects of tobacco advertising that have been shown to have a tendency to mislead or to coerce consumers, thereby disrupting the "fair bargaining process" in commercial transactions. *Cf. 44 Liquormart*, 517 U.S. at 501 (plurality). Nor is this a case in which the government has identified a particular advertising device that is intentionally and uniquely targeted to children, thereby directly threatening the legality of the transactions proposed. *Cf. Carey*, 431 U.S. at 701. On the contrary, it is uncontested that Massachusetts' blunderbuss approach is based on the notion that the *mere* expression of

any favorable idea concerning a tobacco product—in any manner—in most public areas is inherently harmful.

Both the First Circuit and the district court below placed great emphasis on the fact that the Attorney General purports to have been motivated by concerns about the effect of tobacco advertising on children. But this subjective motivation, however worthy, cannot obscure the fact that the Attorney General's chosen *means* of accomplishing this end was to enshrine in state law the censorial theory that virtually no public display of favorable images of tobacco will be permitted in Massachusetts. The State has already obtained, in the MSA, a consent decree—backed up by potentially severe civil and criminal contempt sanctions—that explicitly forbids the "targeting" of youth in advertising, the use of any advertising device whose "primary purpose" is "to initiate, maintain or increase the incidence of Youth smoking within the State of Massachusetts," or the use of a "cartoon" in cigarette advertising. JA 260. By contrast, the challenged regulations are not based on the claimed elimination of particularized commercially harmful devices used in advertising tobacco; rather, they are based on the theory that, *merely* by expressing a favorable message about cigarettes, cigars, or smokeless products, even the smallest tobacco advertisement on a storefront will give any children who may happen to see it the wrong idea and therefore must be suppressed from public view. This is not commercial regulation; it is the regulation of an idea pure and simple.

The point is well illustrated by *Carey*, in which the Court rejected an argument virtually identical to the one made by Massachusetts here. In *Carey*, the Court invalidated a prohibition on the advertising and display of contraceptives, and the State made a comparable argument that its restrictions merely regulated speech based on a desire to protect children. 431 U.S. at 701. The Court squarely held that the professed desire to protect children from favorable messages about a

controversial product was insufficient to save the State's suppression of such speech. In *Carey* (as in this case), the regulations did not purport to identify any particular *subclass* of advertising that can be shown to directly incite imminent lawless action by minors, *see id.* (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)), but instead treated all contraceptive advertising with the same broad brush. And in *Carey* (as in this case), the challenged provisions prohibited, in a broadly defined geographic area, the display of *any* advertising of the product, including advertising that "merely state[s] the availability of products and services that are . . . entirely legal." 431 U.S. at 701. After noting that the State's prohibition of contraceptive advertising could not be justified as a commercial regulation, the Court explicitly stated that the State's professed concern about children's reaction to the public expression of ideas about a controversial product was a frank concession that the speech was *not* being regulated based on its uniquely commercial aspects:

> [The State] suggest[s] no distinction between commercial and noncommercial speech that would render these discredited arguments meritorious when offered to justify prohibitions on commercial speech. On the contrary, such arguments are clearly directed not at any commercial aspect of the prohibited advertising *but at the ideas conveyed* and form of expression—the core of First Amendment values.

Carey, 431 U.S. at 701 n.28 (emphasis added). That is precisely the case here, and the challenged regulations necessarily fail. *See also Linmark*, 431 U.S. at 93-94 (prohibition on "for sale" signs in front of homes was not "unrelated to the suppression of free expression" but was instead premised on the communicative effect of the message's content).

The impermissible nature of the State's content-discrimination is all the more apparent when one considers the extraordinary sweep of the restrictions, which greatly magnifies the concerns over possible censorship of disfavored ideas. While invoking the specific aim of protecting children from tobacco-related messages, the Attorney General has imposed restrictions that effectively deprive many local retailers of the ability to market tobacco products to adults who may lawfully purchase and use them. Although any number of products that may only be lawfully purchased by adults (such as alcohol) pose health risks for children, the Attorney General has imposed his broad advertising prohibitions *only* on tobacco products.

By prohibiting outdoor tobacco advertising in all but a marginal portion of the State's most populated areas, the Attorney General's regulations deny adults the opportunity to decide whether to ignore, accept, act upon, or reject tobacco messages from local stores, marts, and gas stations. The extraordinary sweep of the Attorney General's regulations extends the state's paternalistic anti-smoking policy to adults as well as children, even though smoking is perfectly legal for adults. The regulations operate to "prevent men and women from hearing facts that might not be good for them," *44 Liquormart*, 517 U.S. at 517 (Scalia, J., concurring) and can be justified only "based on the benefits of public ignorance," *Bates*, 433 U.S. at 375. Strict scrutiny is therefore appropriate, and the extraordinary breadth of the regulations plainly confirms that they cannot survive such scrutiny. *Cf. United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878, 1886-87 (2000) ("[T]he objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative.").

B. The Regulations Also Are Viewpoint-Discriminatory In Nature And Warrant Strict Scrutiny For This Independent Reason As Well.

The singular sweep and severity of the regulations, together with the State's own expressions of opinion regarding tobacco products, demonstrate that there is more than a "realistic possibility that official suppression of ideas is afoot." *R.A.V.*, 505 U.S. at 390. The transparent objective of the Massachusetts regulations is not just to regulate a category of speech but to "drive . . . viewpoints from the marketplace," *id.* at 387 (quotation omitted), that are inconsistent with the State's. That makes the violation of the First Amendment all the more "egregious," *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829, 830-31 (1995), and makes the case for declining to apply *Central Hudson* to this setting all the more compelling.

One "freedom of speech" principle surpasses every other: government may not "favor some viewpoints or ideas at the expense of others." *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger*, 515 U.S. at 829.

This case presents not just the risk, but the fact, of viewpoint discrimination. Doubtless, the State is free to publicize its own views about cigarettes, but in doing so it may not "prohibit, edit, or restrain the distribution of advocacy materials" offering a different view. *Meese v. Keene*, 481 U.S. 465, 480 (1987). And that is precisely what the State has done.

The facts of this case make clear that the State's actions are designed in part to suppress a viewpoint with which the State disagrees. In banning advertisements that promote the sale of tobacco products, for example, these regulations represent the

culmination of one State's "war against Big Tobacco." JA 248. Even the most aloof observer would find it difficult to discern where the political nature of such speech restrictions ends and the commercial nature of the regulations begins.

Making matters worse, the Massachusetts regulations silence not just one alternative viewpoint but a multiplicity of viewpoints. Whether it be large tobacco companies or small ones, companies with new products or companies with old ones, or the smallest retailers or the largest distributors, each has a different interest in a free flow of truthful information on this subject. Yet because each of these different viewpoints expresses something favorable about a tobacco product (whether it be taste, price, etc.), each differs from the orthodoxy prescribed by the State, and they are all substantially suppressed. And it is of course too late in the day to argue "that no viewpoint discrimination occurs because the [regulations] discriminate against an entire class of viewpoints." *Rosenberger*, 515 U.S. at 831-32. That position "reflects an insupportable assumption that all debate is bipolar" and constitutes "a contrived description of the marketplace of ideas." *Id.* at 831.

The court of appeals gave insufficient weight to the viewpoint-discriminatory nature of Massachusetts' regime. In finding no "danger of viewpoint discrimination," the lower court noted that the regulations apply to all tobacco products "regardless of brand or manufacturer"; that they "permit nonpromotional speech relating to tobacco products"; and that "[t]he companies make no allegation that the Attorney General has disparately, much less discriminatorily, applied these provisions." Pet. App. 15a-16a. But it is hardly reassuring to observe that Massachusetts has not applied the regulations in a discriminatory manner: who needs to *apply* provisions discriminatorily when the provisions already discriminate *on their face*? That the regulations prohibit only speech that "promotes" tobacco consumption, *see* 940 C.M.R. § 21.03

(Pet. App. 107a), while permitting both "nonpromotional" and commercial speech that discourages tobacco consumption, *see* Pet. App. at 14a (allowing "tobacco-related speech that has a purpose or effect other than promotion, such as public health campaigns"), is precisely why they *are* viewpoint-based. The Court has never rejected the argument that anything less than strict scrutiny applies to such transparent censorship. It should not do so here.

C. Massachusetts' Near-Total Ban On Outdoor and Indoor Tobacco Advertising Fails *Central Hudson*.

Even if the Court were to apply intermediate scrutiny under *Central Hudson*, the Massachusetts regulations still violate the First Amendment. More particularly, Massachusetts has failed to satisfy the last two elements of the *Central Hudson* test—*i.e.*, that the regulatory measure "directly advances" the government's interests and that it be no "more extensive than is necessary." 447 U.S. at 566.

1. The State bears the burden of demonstrating that its speech ban "advances [its] interests in a direct and material way." *Edenfield*, 507 U.S. at 767; *Central Hudson*, 447 U.S. at 564. "[M]ere speculation or conjecture," the Court has emphasized, will not suffice. *Edenfield*, 507 U.S. at 770. Nor will a justification that "provides only the most limited incremental support for the interest asserted." *Bolger*, 463 U.S. at 73. Rather, the State "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 771. Otherwise, "'a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.'" *Rubin*, 514 U.S. at 487 (quoting *Edenfield*, 507 U.S. at 771); *accord Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 189 (1999).

Measured against this test, the State's showing plainly fails. In arguing that its ban directly advances the objective of curbing underage smoking, it points principally to a 1994 Surgeon General's report and the background statement accompanying the FDA's now-invalidated (*see FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120 (2000)) regulation of tobacco advertising. Pet. App. 26a-27a; *see* JA 187-209, 225-38. The First Circuit gave these materials only the most cursory attention, "declin[ing] to summarize" their content and simply announcing, without amplification, that they are "sufficient to satisfy the Attorney General's burden." Pet. App. 27a. They are not.

On their face, Massachusetts' submissions do not purport to demonstrate a causal link between cigarette advertising and the initiation of illegal youth smoking. JA 204 ("To date, . . . no longitudinal study of the direct relationship of cigarette advertising to smoking initiation has been reported in the literature."); JA 229 ("[N]one of these studies individually is sufficient to . . . [e]stablish that advertising has an effect of directly causing minors to use tobacco products."). *See also* JA 135-44 (Morse Aff.), 145-61 (Henke Rep.). Nor can Massachusetts overcome this deficiency merely by pointing to studies purporting to establish that advertising generally increases demand for tobacco products. Even "[a]ssuming the accuracy of [a] causal chain" between advertising and the incidence of smoking,[6] "it does not necessarily follow that the

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[6] The expert testimony and accompanying studies submitted by Petitioners demonstrated that there is no substantial relationship between the challenged advertising and overall smoking rates; the effect of the advertising is primarily to shift or preserve the brand loyalties of persons who already smoke. JA 147-51. Thus, for example, Petitioners pointed out that tobacco consumption in three countries with advertising bans (Canada, Norway, and Finland) did not decline after those bans were instituted. JA 159-60. Petitioners' experts also exhaustively surveyed the academic literature and concluded that "tobacco advertising and

[State's] speech ban has directly and materially furthered the asserted interest" in curbing illegal youth smoking. *Greater New Orleans Broad.*, 527 U.S. at 189. Massachusetts utterly failed to show that its proposed advertising restrictions would have any material impact on underage tobacco use, especially in light of the new restrictions already imposed by the MSA.

The MSA (JA 259-71) already places considerable restrictions on cigarette companies' advertisements. Among other things, the MSA says that Petitioners may not: display any advertising "outdoors, or . . . on the inside surface of a window facing outward" unless the advertising "does not occupy an area larger than 14 square feet" (MSA §§ II(ii), III(d), JA 259-60, 263-64). On top of this, the MSA contemplates that the States will oversee extensive advertising regarding the risks of youth smoking. *See id.*, § III(d)(3), JA 264; *id.*, § VI, 1st Cir. JCA 3372-79.

In the face of these measures, it is difficult to credit the State's claim that its additional advertising restrictions —eliminating all remaining outdoor signs, which are less than 14 square feet in size—will provide anything but the most "marginal degree of protection" against underage smoking. *Bolger*, 463 U.S. at 73. No study or any other evidentiary support demonstrates that the Attorney General's additional measures will achieve an additional "significant reduction" in underage smoking. *44 Liquormart*, 517 U.S. at 506-07 (plurality). And, in truth, the record confirms that the State never even considered studying the efficacy of these other measures. On the very day the State elected to join the MSA, the Attorney General announced his intention to promulgate these additional regulations. *See* JA 251. Quite plainly, the

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promotion plays no material role in the decision of minors to begin using tobacco products." JA 139, 152. Rather, factors such as family influence and peer pressure principally determine whether minors will become smokers. JA 139, 152-53.

State's rush to place these additional speech restrictions on tobacco advertising was not based on any evidence that these measures would lend anything more than "limited incremental support" to the asserted goal of reducing underage smoking. *Bolger*, 463 U.S. at 73. The regulations should be invalidated on this independent ground.

2. In addition to violating *Central Hudson*'s third prong, the Massachusetts regulations also violate its fourth. They simply do not reflect the precision that this aspect of the test requires. Instead of demonstrating that the State "'carefully calculated' the costs and benefits associated with the burden on speech imposed by its prohibition," *Discovery Network*, 507 U.S. at 417, the regulations amount to exactly the kind of scattershot legislation that the Court has not hesitated to invalidate in the past.

Central Hudson places the burden on the government to establish a "close fit" between the ends and means of its speech-restrictive regulations. 447 U.S. at 418. "[I]f the governmental interest could be served as well by a more limited restriction on commercial speech," *Central Hudson* instructs, "the excessive restrictions cannot survive." *Id.* at 564-65, 569. Because "the First Amendment directs that government may not suppress speech as easily as it may suppress conduct," the Court has alerted States that "speech restrictions cannot be treated as simply another means that the government may use to achieve its ends." *44 Liquormart*, 517 U.S. at 512 (plurality). Thus, where options are "availabl[e] . . . , all of which could advance the [g]overnment's asserted interest in a manner less intrusive to . . . First Amendment rights," a speech restriction is "more extensive than necessary" and more extensive than is constitutionally permissible. *Rubin*, 514 U.S. at 491; *Discovery Network*, 507 U.S. at 418 & n.13 ("[I]f there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant

consideration in determining whether the 'fit' between ends and means is reasonable.").

In applying this requirement, the Court has upheld restrictions that left open "many alternative channels for communicating necessary information" about the product or service. *Went For It*, 515 U.S. at 633-34. But it repeatedly has invalidated restrictions where no such "alternative channels" were readily available. *See, e.g., 44 Liquormart*, 517 U.S. at 501-02 (plurality); *id.* at 529-30 (O'Connor, J., concurring in the judgment); *Linmark*, 431 U.S. at 92-94.

These requirements cannot be satisfied here. For the ostensible purpose of discouraging underage smoking, the State has enacted what is tantamount to a complete ban on outdoor advertising of cigarettes. The regulations ultimately prohibit outdoor advertising (and indoor advertising that is visible to passers-by) in 90% of the three most heavily-populated areas of Massachusetts. *See* 940 C.M.R. § 21.04(5), Pet. App. 111a; *id.*, § 22.06(5), Pet. App. 123a.

Far from being "narrowly drawn," the regulations overlook numerous "practical and nonspeech-related forms of regulation" that "could more directly and effectively" accomplish the professed goal of reducing underage smoking. *Greater New Orleans Broad.*, 527 U.S. at 192. The State did not have "to choose suppression over a less speech-restrictive policy." *44 Liquormart*, 517 U.S. at 509. It could have, *inter alia*, (1) strictly enforced its laws prohibiting retailers from selling cigarettes to underage buyers; (2) enacted laws making underage purchases of cigarettes illegal; (3) imposed a licensing requirement on retailers as a means of supervising compliance with existing tobacco sales laws; and (4) enforced the prohibition against smoking on school grounds.

Moreover, as noted, the MSA provides that no cigarette manufacturer "may take any action, directly or indirectly, to target Youth within any Settling State in the advertising,

promotion or marketing of Tobacco Products, or take any action the primary purpose of which is to initiate, maintain or increase the incidence of Youth smoking within any Settling State." MSA, § III(a), JA 260. If the State believed that a cigarette manufacturer had failed to comply with these requirements, it could "bring an action . . . to enforce" them. *Id.*, § VII(c), 1st. Cir. JCA 3380. On its face, the MSA thus refutes the State's "contention that the potential [problems associated with underage smoking] cannot be combated by any means short of a blanket ban." *Zauderer v. Office of Disciplinary Counsel of S. Ct. of Ohio*, 471 U.S. 626, 648 (1985).

The Court has repeatedly held that the availability of these types of alternative regulations render a commercial speech-restriction unconstitutional. *See 44 Liquormart*, 517 U.S. at 507 (plurality); *id.* at 529 (O'Connor, J., concurring in judgment); *Rubin*, 514 U.S. at 491. Each of these alternatives is consistent with the First Amendment's command that appropriate private and public decisions be reached by keeping "open the channels of communication rather than . . . [by] clos[ing] them." *Virginia State Bd.*, 425 U.S. at 770; *see also 44 Liquormart*, 517 U.S. at 498 (plurality). *Cf. Carey*, 431 U.S. at 700 (statute that "completely suppress[es]" information about a product is unconstitutional) (citation omitted).[7]

Nor was the court of appeals correct in saying that the 1,000-foot radius was narrowly tailored because some of the Petitioners previously had agreed to refrain from *billboard*

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[7] The Court invalidated the statute in *Carey* to the extent that it prohibited the "advertisement or *display*" of contraceptives. *See* 431 U.S. at 700 (emphasis added). Accordingly, the same First Amendment principles that require invalidation of the outdoor and indoor advertising restrictions require invalidation of the display regulations at issue in this case. *See* 940 C.M.R. §§ 21.04(2)(c), (d), Pet. App. 109a; *id.*, § 22.06(2)(c), (d), Pet. App. 121a.

advertising within a 500-foot radius of schools. Pet. App. 31a. Doubling the radius covered by the regulations, however, causes the associated areas to increase *fourfold*. Accordingly, if a 1,000-foot radius would foreclose advertising across 90% of a metropolitan area, a 500-foot radius would generally only foreclose advertising in less than 22% of the same area. And the regulations prohibit signs of any size, including ones that cannot possibly be seen from 1,000 feet (or even 500 feet). Contrary to the view of the court of appeals (Pet. App. 31a), this increase in speech suppression cannot be blithely dismissed as "splitting hairs." Otherwise, the essential concept of narrowly tailoring has lost all meaning.

That leaves the final ground for the court of appeals' decision—the view that it could sidestep these draconian requirements by claiming that they are necessary to protect children. Despite the importance of insulating minors from certain products, the Court has specifically held that commercial speech restrictions may not "'reduce the adult population . . . to reading only what is fit for children.'" *Bolger*, 463 U.S. at 73-74 (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)). In *Bolger*, the Court invalidated a federal statute prohibiting unsolicited mailed advertisements for contraceptives. Acknowledging the importance of the governmental interest in protecting children from these advertisements, the Court nonetheless concluded that "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." *Id.* at 74. Quoting Justice Frankfurter, the Court reasoned that banning commercial speech about a product lawful for adults, in order to protect children from exposure to the product, would surely "'burn the house to roast the pig.'" *Id.* at 74 n.27 (quoting *Butler*, 352 U.S. at 383). Similarly, *Carey v. Population Servs. Int'l, supra*, invalidated a state law prohibiting advertisements for contraceptives. In rejecting an argument that such advertisements "would legitimize the sexual activity" of

children, the Court responded that this was "classically not [a] justificatio[n] validating the suppression of expression protected by the First Amendment." 431 U.S. at 701.

The Court repeatedly has applied this same principle to invalidate broad restrictions on indecent speech. In *Reno v. ACLU*, 521 U.S. 844 (1997), the Court relied on *Bolger* in invalidating a federal statute that severely restricted Internet indecency. *Id.* at 875. In *Denver Area Educ. Tel. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996), the Court relied on *Bolger* to invalidate a federal law severely restricting cable broadcast indecency, despite recognizing that "[n]o provision . . . short of an absolute ban, can offer certain protection against assault by a determined child." *Id.* at 759. And in *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989), the Court relied on *Bolger* to invalidate a federal statute prohibiting indecent telephone communications, despite recognizing that, short of a ban, "the most enterprising and disobedient young people would manage to secure access to such messages." *Id.* at 130. *See also Playboy Entertainment Group*, 120 S. Ct. at 1886-87 ("[E]ven where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be obtained by a less restrictive alternative.").

In rejecting Petitioners' claim that commercial speech restrictions cannot "deny communication to a large number of adults for the sake of protecting children," the court of appeals reasoned that this principle applies only to what it termed "expressive" speech, but not to "commercial" speech," Pet. App. at 34a. That analysis, however, squarely conflicts with the holdings of *Bolger* and *Carey* (which each involved commercial speech), and with the logic of the Court's recent indecency decisions (which each rely on *Bolger* for the proposition that government may not "reduce the adult population to only what is fit for children," 463 U.S. at 73). Neither was the court of appeals correct in claiming that this

principle did not apply here because the advertising restrictions were not "equivalent to a 'blanket ban' on speech." Pet. App. 35a. Under that reasoning, *Bolger* would apply to a complete ban on advertising a disfavored product, but the interest in protecting children would support an *almost*-complete ban on such advertising. A 90% restriction on advertising in the end warrants the same First Amendment scrutiny that a 100% restriction receives. The lower court's contrary analysis demands reversal.

CONCLUSION

The judgment of the court of appeals should be reversed.

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